

The record for purpose of this appeal consists of the documents filed of record with the Division of Workers Compensation in this docketed matter including the transcript of the Preliminary Hearing held on February 24, 1994, before Administrative Law Judge John D. Clark and the exhibits attached thereto, and the deposition of Kevin Leon Sharbutt taken on October 1, 1993.

**ISSUES**

Whether the claimant sustained personal injury by accident arising out of and in the course of his employment with LNU Pipe Company.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The claimant has met his burden of proof in establishing that he suffered an accidental injury arising out of and in the course of his employment with LNU Pipe Company during his term of employment from May 26, 1993 through July 19, 1993, with the injury culminating on July 19, 1993.

Claimant, a manual laborer, worked for Blitz USA in Miami, Oklahoma, doing hand-intensive physical labor from September 1992 through January 1993. While so employed, claimant developed carpal tunnel-like symptoms and was terminated from his employment in January 1993. Claimant filed a workers compensation claim against Blitz and did ultimately collect benefits, settling his claim against Blitz on November 16, 1993, for \$7,500.00 lump sum.

After his termination at Blitz, claimant received unemployment and was involved in a reduced physical labor situation until May 26, 1993, when he was hired at LNU Pipe Company. During this period of reduced activity claimant's condition improved.

Claimant, at LNU Pipe Company, was first placed on the pipe roller machine which required that he use hand controls with little physical labor involved. Claimant had no problem performing these tasks. Shortly thereafter, claimant was transferred from the pipe roller job to grinding and welding, which involved hand-intensive labor. Claimant's symptoms in his hands and wrists returned, as he described it, worse than when he was working at Blitz. Claimant estimated the problems at Blitz on a scale from one to ten as being seven. During his period of inactivity, his hand problems reduced to a five. Upon return to hand-intensive labor at LNU his problems worsened to an eight.

While working at Blitz, claimant awoke almost every day with numb hands. After starting the welding and grinding job at LNU, the hand numbness and the awakening returned and worsened.

Claimant was examined by Dr. Kenneth C. Duncan on July 23, 1993. Dr. Duncan diagnosed claimant as having evidence of bilateral carpal tunnel syndrome, greater on the right than on the left, olecranon bursitis and extensor carpi radialis tendinitis of the right elbow. He opined that these abnormalities were directly attributable to the work at Blitz USA followed by a period of improvement with cessation of work followed thereafter by an aggravation and escalation of his complaints while working at LNU. Dr. Duncan found claimant to be temporarily totally disabled and in need of medical treatment for these conditions.

Claimant was also examined by Dr. David K. Wong, an orthopedist in Tulsa, Oklahoma. Dr. Wong diagnosed an overuse symptomatology in both upper extremities which he described as possible early carpal tunnel syndrome. Dr. Wong found that

claimant had worked at Blitz USA when developing these symptoms. This employment was followed by a period of inactivity when his symptoms improved, followed shortly thereafter by his work at LNU when his symptoms returned. No other medical evidence was placed into the record.

Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own decision. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

In this matter, the claimant testified to having problems while working for Blitz USA. He further stated that these problems improved during his period of inactivity from January 1993 until May 1993, only to resurface again at a higher level after having gone to work at LNU Pipe Company performing hand-intensive labor.

The Appeals Board recognizes under the modifications to K.S.A. 44-501(c) that an employee is restricted from recovery for aggravations of pre-existing conditions except to the extent that the work-related injury caused increased disability, should this be found to be a post July 1, 1993 date of injury for final award purposes.

The determination of the amount of disability a claimant may or may not have suffered is a determination for final award. At that time, if it is found that claimant had a pre-existing condition, any recovery he would be entitled to will be reduced depending upon the Court's assessment of any prior functional impairment claimant may have suffered.

The statutory modifications of K.S.A. 44-501(c) do not automatically preclude claimant from entitlement to medical and/or temporary total benefits should claimant suffer an aggravation of a pre-existing condition with an injury date post-July 1, 1993.

For purpose of preliminary hearing only, the Appeals Board finds claimant has carried his burden in showing an aggravation of a pre-existing condition for which he is entitled to temporary total disability and medical benefits.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury by accident arising out of and in the course of his employment with LNU Pipe Company, Inc., that the Order of Administrative Law Judge John D. Clark dated March 15, 1994, denying claimant benefits is hereby reversed and this matter is remanded to the Administrative Law Judge for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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John D. Clark, Administrative Law Judge  
George Gomez, Director